STATUTE OF FRAUDS AND PART PERFORMANCE

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The application in equity of the doctrine of part performance to the fourth section of the Statute of Frauds 1 is commonly said to furnish one of the most interesting examples of judicial legislation to be found in the books. The statute, passed in 1677 for the purpose of correcting the very apparent frauds and perjuries prevalent at the time, was set upon almost immediately by the courts of equity, and its teeth drawn rather effectively. The statute was made stringent to fill a serious need, 2 but the courts of equity removed much of its stringency. May such evasion of the statute be supported, and, if so, upon what grounds?

1 29 Charles II, c. 3, § 4 (1677). "IV. And be it further enacted by the authority aforesaid, That . . . no action shall be brought . . . (3) to charge any person upon any agreement made upon consideration of marriage; (4) or upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them; (5) or upon any agreement that is not to be performed within the space of one year from the making thereof; (6) unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

"Compiled Statutes of North Carolina 1919, Section 988. All contracts to sell or convey any lands, tenements or hereditaments, or any interest in or concerning them, and all leases and contracts for leasing land for the purpose of digging for gold or other minerals, or for mining generally, of whatever duration; and all other leases and contracts for leasing lands exceeding in duration three years from the making thereof, shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized." Cook, Cases on Equity (1925) 413. Note the use of "void" rather than "no action shall be brought" as in the original statute, 29 Charles II, c. 3, § 4 (1677).

"In some states the English statute of frauds has been copied rather closely. In others the statutes, though following the English model, have been framed with material variations. It would be difficult to say what is the typical American statute. But it would be safe to say that the interpretation of the American statutes has never been approached as an original problem. They have been read in the light of the English statute and the decisions thereon. Slight variations in phraseology have not been regarded as varying in meaning, and, in some cases, the language of the local statute has been ignored in favor of traditional law, as in Riley v. Bancroft's Estate, 51 Nebr. 864, 71 N. W. 745; and Abbott v. Draper, 4 Den. (N. Y.) 51, holding 'void' to mean merely 'unenforceable.'" Durfee, Cases on Equity (1928) 420.

2 See Costigan, Interpretation of the Statute of Frauds (1919) 14 Ill. L. Rev. 1, 5.
We propose to divide our study of the subject into four parts:

2. Cases Involving Marriage.
3. Cases Involving Payment of a Part or All of the Purchase Price.

The statute was intended to apply to courts of equity as well as to courts of law, and there should be no opportunity for a plaintiff to evade it by merely changing the court. Yet there are certain types of cases where equity should afford relief. In attempting to sustain the evasion of the statute in such cases, we hope to sustain the thesis of this paper, which is, that cases should only be taken out of the statute on the ground of preventing fraud of some kind; in other words, that part performance is not the test, but that fraud, actual or "equitable" is the test; 

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3 Purcell v. Coleman, 4 Wall. 513 (U. S. 1866); see Glass v. Hulbert, 102 Mass. 24, 28 (1869); BROWNE, STATUTE OF FRAUDS (5th ed., 1895), § 437; 27 C. J. 340. "Courts of law are expressly forbidden to entertain any such action. Unless, therefore, something can be discovered in the conduct of the parties varying their legal rights, no suit for the specific performance of this alleged contract can be entertained in this Court. It would be a scandal to suppose that when the Legislature has said that no action shall be brought on a parol contract of a particular description, it should be open to one of the contracting parties to escape from the consequence by simply shifting his sphere of operations from a Court of law to a Court of equity." Caton v. Caton, L. R. 1 Ch. App. 137, 147 (1866).

4 "... the fraud against which courts of equity, in the cases we have to consider, afford relief, consists in the repudiation of a contract which has been made, and upon which an innocent party has actually proceeded to do that for which the jurisdiction of the law courts affords him no recompense. ... The correct view appears to be that equity will at all times lend its aid to defeat a fraud, notwithstanding the Statute of Frauds; and upon this simple ground it is believed that the many decisions in equity which it is now our duty to examine will be found substantially to rest." BROWNE, STATUTE OF FRAUDS (3d ed. 1870) § 438.

"It is obvious that the mere circumstance that a verbal agreement has been in part performed, can afford no reason, such as to control the action of any court, whether of law or equity, for holding the parties bound to perform what remains executory. The doctrine of equity in such cases is, that where an agreement has been so far executed by one party, with the tacit encouragement of the other, and relying upon his fulfillment of it, that for the latter to repudiate it and shelter himself under the provisions of the statute, would amount to a fraud upon the former, that fraud will be defeated by compelling him to carry out the agreement. ... The cases which have already been considered present the feature of actual fraud, an artifice, a trick which being alleged and proved, was relieved against by the court of equity without any reference to the statute.
that no matter how great the part performance, unless practically equivalent to full performance, relief should be refused in equity, unless such refusal would result in a fraud on the plaintiff. As we tread the maze of conflicting decisions to be found in the books, we shall keep this deduction in mind.

I. BASIS OF DOCTRINE OF PART PERFORMANCE

Although the general term "fraud" furnishes the background for the doctrine of part performance, the explanations given by courts of equity for the bold evasion of the statute are susceptible of further examination. One is that chancellors from the beginning have felt that the statute, passed to prevent fraud, should not in itself be the means of perpetrating fraud. If such statements

The fraud in cases of part-performance is no less fraud because not asserted to have been, and not, in fact, premeditated at the inception of the transaction. Hence those courts of equity whose established powers extend to all cases of fraud of whatever description are able to enforce the contract, and do so upon the ground of fraud, and upon none other." (Italics are the author's.) BROWNE, STATUTE OF FRAUDS (3d ed. 1870) § 448.

"It was very clear that the relief against the statute in these cases, of part performance, was originally founded on the fraud and deceit usually characterizing the circumstances, and arose naturally and necessarily out of the jurisdiction of the court. The present Lord Chancellor of Ireland, when at the bar, observed, in arguing for the defendant, in Whitebread v. Brockhurst, that courts of equity had, in some cases, decreed a specific performance of parol agreements, but that the only ground upon which they had so decreed was fraud." ROBERTS, STATUTE OF FRAUDS (3d Amer. ed. 1823) 131.

"It might appear to be a usurpation of legislative power for courts of equity to enforce a verbal contract, proved entirely by parol evidence, in the face of the statute which requires the evidence of a written instrument signed by the party to be charged. In truth, however, there is no attempt or design to repeal the statute. The doctrine of part performance is merely a particular application of the general principle which supports a great part of the equitable jurisdiction; the principle that fraud shall be prevented, relieved against, or punished in whatever form or under whatever guise it may appear. It is simply saying that a man shall not be permitted to use a statute, more than any other assistant, for the purpose of promoting his own fraudulent intents or defending his own fraudulent conduct. If to this principle is joined the equitable conception of fraud, which sees the intent in the nature and consequences of a man's acts as well as in his own mental operations, the doctrine at once arises as a natural and necessary consequence." POMEROY, SPECIFIC PERFORMANCE OF CONTRACTS (3d ed. 1926) § 103.

"Any exceptions, then, have come about by a process of judicial legislation. Just why the courts felt constrained to make any exceptions to a plain and unambiguous statute, is not clear, but the most probable view is that they did it in order to enforce the policy of the statute. It has been frequently stated that the reason the statute is disregarded in some cases is that otherwise it would work a worse fraud than it was designed to prevent. Mundy v. Jolliffe, 5 Mylne & Craig 167 (1839); Malins v. Brown, 4 N. Y. 403 (1850); Hibbert v. Aylott, 52 Tex. 530 (1880)." Note (1924) 2 TEx. L. REv. 347.
are made in cases of fraud or in cases where the application of the *equitable fraud* rule is not too loosely applied, they are in full accord with fundamental equity principles. But often they refer to weak cases of what the court considers to be *equitable fraud*. It is submitted that the courts today should be loath to evade the wise provisions of a statute of general policy because they work a hardship in individual cases.

Conditions at the time the statute was passed were largely responsible for such statements in the early cases. The majority of the people of the time were ignorant and unlettered. Added to this was the fact that they were accustomed to seeing estates transferred by mere parol agreement and livery of seisin. In such a situation a literal enforcement of the statute would have worked a great hardship. Abrupt legislation, instead of correcting evils, may intensify them. Certain it is that the ameliorating influence of equity upon the Statute of Frauds at that time, though often criticised, has much to commend it.

Perhaps the earliest example of the attitude of equity that the statute, passed to prevent fraud, should not be the means of perpetrating it, is cited by Viner:

"Where the statute has been used to cover a fraud, the Court has always relieved. The first case was in Lord Nottingham's time, where there was an absolute conveyance and a defeasance, which defendant would not execute, but insisted on the statute, and it was overruled."

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6 The reason has often been criticized. For example: "'Courts of Equity will not permit the statute to be made an instrument of fraud.' By this it cannot be meant that equity will relieve against a public statute of general policy in cases admitted to fall within it; and I agree with an observation made by Lord Justice Cotton, in *Brittin v. Rossiter* that this summary way of stating the principle (however true it may be when properly understood) is not an adequate explanation, either of the precise grounds, or of the established limits, of the equitable doctrine of part performance." (Italics are the author's.) Selborne, L. C., in Maddison v. Alderson, 8 App. Cas. 467, 474 (1883).


8 "We might say that there is a natural provision for this sort of indulgences, in the fact that no man is perfect enough to bear a strict application of rules, and very few hearts are hard enough to enforce, without flinching, the letter of the law when it results in upholding injustice." Poorman v. Kilgore, *supra* note 7, at 370.

9 5 Vin. Ab. (2d ed. 1792) 523.
\textit{Mullet v. Halfpenny} \textsuperscript{10} is the leading case granting relief on the ground of the prevention of fraud. In that case, decided but twenty-two years after the statute, there was a contract of marriage between the plaintiff and the defendant's daughter. The plaintiff had signed the articles, but the defendant had not done so. The plaintiff sued to recover the marriage portion as agreed, and the Master of the Rolls ordered it paid. The decision was based upon the fact that the defendant had permitted his daughter to be courted without objection, and had even “stood at the corner of a street to see them go to be married.” There is some question as to just what the facts were in the case. As reported in 2 Vernon 373, the defendant did not sign the articles, but in the reference to the case in \textit{Bawdes v. Amhurst} \textsuperscript{11} he ordered his daughter to “put on a good humor, and get the plaintiff to deliver up that writing, and then to marry him, which she accordingly did.” \textsuperscript{12} It is evident that the latter version makes a much stronger case of fraud.

Manifestly, in cases like \textit{Mullet v. Halfpenny}, where there is actual fraud, the plaintiff should have relief, but when the defendant has simply promised to sign the contract, and later refuses to do so, such noncompliance in itself does not constitute fraud. Nor is it fraudulent that the defendant decides to plead the statute, where the contract is parol. He is simply relying on his legal rights. There must be something more than this to constitute fraud.\textsuperscript{13}

However, there may be a situation where the vendor has practised no fraud whatever, but where to permit him to set up the statute will result in a fraud on the vendee. Of this nature are the equitable fraud cases. It is difficult to protect the plaintiff, in such a case, unless there is some element of equitable estoppel operating against the defendant. This is true no matter how great may be the resulting hardship to the plaintiff, for otherwise the policy of the statute is defeated. Nevertheless, courts have

\textsuperscript{10} 2 Vern. 373 (Eng. 1699).
\textsuperscript{11} Prec. Ch. 402 (Eng. 1715).
\textsuperscript{12} Italics are the author's.
\textsuperscript{13} \textit{Op. cit. supra} note 5, at 355.
seen fit, in many cases where there was no evidence of estoppel, legal or equitable, to decree specific performance, probably upon the theory of "irreparable injury." Such cases are dangerous departures.

The leading case involving equitable fraud is *Mundy v. Jolliffe.* In that case Lord Cottenham said:

"Courts of Equity exercise their jurisdiction, in decreeing specific performance of verbal agreements, where there has been part performance, for the purpose of preventing the great injustice which would arise from permitting a party to escape from the engagements he has entered into, upon the ground of the Statute of Frauds, after the other party to the contract has, upon the faith of such agreement, expended his money or otherwise acted in execution of the agreement. Under such circumstances, the Court will struggle to prevent such injustice from being effected . . . "

Pomeroy fairly expressed the same idea in his theory of equitable fraud, when he said:

"The doctrine was settled at an early day in England, and has been fully adopted in nearly all the American states, that a verbal contract for the sale or leasing of land, or for a settlement made upon consideration of marriage, if part performed by the party seeking the remedy, may be specifically enforced by courts of equity, notwithstanding the statute of frauds. The ground upon which the remedy in such cases rests is that of equitable fraud. It would be a virtual fraud for the defendant, after permitting the acts of part performance, to interpose the statute as a bar to the plaintiff's remedial right."

In order to apply the doctrine of equitable fraud, the defendant should be in a position where he is at least morally responsible for the plaintiff's hardship and should thereby be prevented from asserting the statute. As one writer has expressed it:

"Some development not usually consequent upon such transactions and in fact unknown to the defendant ought not

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15 5 Myl. & C. 167 (Eng. 1839).
16 Ibid. at 177.
to be charged against him. On the other hand, if the plaintiff makes improvements, or purchases other lands, or otherwise changes his position in reliance on the contract, the defendant reasonably knowing such to be the fact, and doing nothing to prevent it, the defendant ought to be held accountable. Somewhere in between these extremes is the dividing line.”

In other words, there should be an equitable estoppel (not too loosely applied) in order to have a case of equitable fraud.

As much as the writer desires to keep the cases within the one grouping, it is impossible. Most American courts, apparently, have come to rest the doctrine of part performance upon the ground of equitable or virtual fraud; but, historically at least, there is another line of cases, often referred to as the “possession cases,” which cannot be explained on that ground. This line of adjudications is still followed in England and has a marked influence on the American decisions. The “fraud” line of cases is not surprising in a court of equity, but the “possession” line requires a careful examination. For that reason a discussion of these cases is deferred until part four of this study.

2. CASES INVOLVING MARRIAGE

The Statute of Frauds prevents the bringing of any action upon any agreement made upon consideration of marriage, unless it has been reduced to writing and signed by the party to be charged. It is interesting to speculate upon the reasons for including such contracts in the statute. One of the most naive suggestions is that made in argument before Lord Parker, afterwards Earl of Macclesfield, that “there was the greatest reason for it, since in no case could there be supposed so many unguarded expressions and promises used, as in addresses in order to mar-

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18 Cox, Part Performance as Validating Parol Contracts for the Sale of Lands (1927) 6 Tex. L. Rev. 51, 55. Continuing to quote: "Proceeding in a purely analytical manner, the writer, with all humility and fear, has deduced from the decided cases a rule as being descriptive of the results reached:

"Equity will relieve a parol contract for the sale of land from the operation of the statute of frauds when the party seeking relief has partially performed his part of the bargain, or is ready and willing to perform, and has changed his
riage, where many passages of gallantry usually occur." 

Undoubtedly this represents the attitude of many towards "puffing" in courtship, and it apparently had much to do with the inclusion of the provision.

Courts of equity have held, almost unanimously, that the doctrine of part performance does not apply to marriage cases. This attitude and the reason therefor were well expressed by Lord Cranworth:

"That marriage itself is no part performance within the rule of equity is certain. Marriage is necessary in order to bring a case within the statute, and to hold that it also takes the case out of the statute would be a palpable absurdity." 

position in reliance upon the contract in such a manner that denial of the contract's validity would work material hardship upon him, and in such manner that the other party knew, or ought to have known, that the parol agreement was being relied upon, with such result."

Montacute v. Maxwell, 1 P. Wms. 618, 619 (Eng. 1720); cf. Warden v. Jones, 2 De Gex & J. 76, 83 (Eng. 1857): "Persons are so likely to be led into such promises inconsiderately, that the law has wisely required them to be manifested by writing; and it is the duty of this Court to act in conformity with the statute, and not to endeavor to escape from its generally very salutary enactments in consequence of its operating harshly in a particular case."

Dundas v. Dutens, 1 Ves. 195 (Eng. 1790); Montacute v. Maxwell, supra note 19; Lassence v. Tierney, 1 Mac. & G. 551 (Eng. 1849); Caton v. Caton, L. R. 1 Ch. App. 137 (1866); Hunt v. Hunt, 171 N. Y. 396, 64 N. E. 159 (1902); Re Hibbard, 89 Misc. 707, 153 N. Y. Supp. 1097 (1915); Ennis v. Ennis, 48 Hun 11 (N. Y. 1888); Pennsylvania R. R. v. Warren, 69 N. J. Eq. 706, 60 Atl. 1122 (1905); Finch v. Finch, 10 Ohio St. 501 (1860); Hughes v. Hughes, 49 Cal. App. 206, 193 Pac. 144 (1920); Fischer v. Fischer, 106 Neb. 477, 184 N. W. 116 (1921).

Caton v. Caton, supra note 20, at 147; cf. Montacute v. Maxwell, supra note 19: "That it was very wrong to call marriage the execution of the promise, when until the marriage it was not within the statute; and the statute makes the promise in consideration of marriage void; therefore to say that the marriage was an execution which should render the promise good, was quite frustrating the statute: which the court took notice of and approved."

"... a parol contract followed only by marriage is not to be carried into effect, marriage being no part performance of the contract. If it were, there would be an end of the statute, which says that a contract in consideration of marriage shall not be binding, unless it be in writing; but if marriage be part performance, every parol contract followed by marriage would be binding. That is no new doctrine; it is what Lord Eldon lays down in Dundas v. Dutens (1 Ves. jun. 196), and has always been considered and recognized as law." Lassence v. Tierney, supra note 20, at 577.

"We entirely agree with the learned Judges in their view of the law, that when a verbal contract is made in relation to, or upon consideration of marriage, the marriage alone is not a part performance upon which to decree a specific execution. This rule, which is firmly established, is based upon the express lan-
This is at once apparent. Marriage is the very thing contemplated by the legislature to bring the particular case within the provision. To hold that marriage could also be such part performance as to take the case out of the statute, would make the provision wholly nugatory, for such part performance occurs in every case which comes within the provision. This conclusion, though harsh, is the only logical one, and the one which apparently was intended by the legislature.

It should be emphasized that this conclusion gives no opportunity for the application of the "equitable fraud" rule to marriage cases. Nothing short of actual fraud is sufficient. This result, the only logical one, has led to much criticism of the provision relating to marriage. It is true that there is a change of position when the marriage occurs, which results in what may well be considered a virtual fraud on the woman if the contract cannot be enforced, but such a situation results in every case to some degree, so that to attempt to give any relief on this account is to nullify completely the provision in the statute relating to agreements made upon consideration of marriage.

In order to obviate this harshness in part, equity has been rather lenient in considering other independent acts of part performance, in connection with the marriage, as sufficient to take the case out of the statute. But marriage followed by cohabitation is manifestly not such part performance as to warrant an application of this rule. The wife has merely performed her marital duty.

guage of the statute. A promise made in anticipation of and followed by marriage, is the exact case contemplated by the statute. It is plain that the marriage adds nothing to the very circumstances described by the statutory provision which makes writing essential. Offutt v. Offutt, 106 Md. 236, 240, 67 Atl. 138, 139 (1907).


Although equity refuses to take a case out of the statute where the plaintiff has relied on the "honour, word or promise" of the defendant, relief is granted when the parol promise was made without any intention of carrying it out, and merely to induce the marriage. Such promises constitute actual fraud, and they are to be carefully distinguished from cases of equitable fraud, since, as already suggested, there is no application of the equitable fraud rule to marriage cases. Peek v. Peek is the leading American case of actual fraud. The husband in that case told his prospective wife that "they were all busy at the courthouse" and that he could not get the deeds fixed but that she could "rest contented." On the very day that he was making this excuse, he executed a deed conveying the property to his son—a case of positive fraud. The court said:

"It has been laid down that if the agreement was intended to be reduced to writing, but was prevented from being so by the fraudulent contrivance of the party to be bound by it, equity will compel its specific performance."

The case represents the application of a sound general doctrine of equity. Marriage in such a situation constitutes such an irretrievable change of position, that, if procured by artifice, the party perpetrating the fraud should not be permitted to take refuge behind the statute.

In concluding our study of this section of part performance and the Statute of Frauds, we find ourselves dissatisfied with the result in many of the cases coming under the provision relating

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24 Montecute v. Maxwell, supra note 19.

25 "Besides these cases of fraudulent creation of the bar and fraudulent representations acted on, the books speak of another case, namely, 'a marriage brought about by fraud of the promisor.' Statements to this effect go back to Cookes v. Mascall [2 Vern. 200 (1690)] and Dundas v. Dutens [1 Ves. Jr. 196, 199 (1790)]. In the former, without fraud of any sort, a marriage settlement reduced to writing but not signed by either party, was decreed to be performed. In the latter, Lord Thurlow said obiter: 'If the husband made an agreement that he would settle and then in fraud of that agreement got married, would not he be bound by it?' Later English decisions make it very doubtful whether the inference drawn from these old cases can stand." Pound, The Progress of the Law, 1918-1919 (1920) 33 Harv. L. Rev. 929, 938.

26 77 Cal. 166, 19 Pac. 227 (1888).

27 Ibid. at 110, 19 Pac. at 228.
to agreements made upon consideration of marriage. Others have felt a like dissatisfaction.\textsuperscript{28} Browne considered that "it would seem that where a party, to whom a marriage portion has been promised, actually enters into the marriage upon the faith of the promise, this is such an act in execution of the agreement as answers all the requirements of courts in decreeing specific performance."\textsuperscript{29} But this conclusion, persuasive as it is, is impossible, because of the wording of the statute, which apparently prohibits the application of the doctrine of part performance to this provision, "because the statute is expressed in that manner."\textsuperscript{30} This unfortunate result appears inescapable, which leads one to speculate as to whether the provision, particularly as worded, should have been included in the statute. Certainly, in protecting the man from "unguarded expressions and promises," it has resulted in another illustration of the saying that "it is the woman who pays."

3. Cases Involving Payment of a Part or All of the Purchase Price

Lord Hardwicke made the general statement, in 1743, that "paying of money has always been held in this court as a part performance."\textsuperscript{31} He considered that this was an "act done, as appears to the court would not have been done, unless on account of the agreement." And yet, in 1721, it had been held that the

\textsuperscript{28} "The Statute of Frauds renders all promises in consideration of marriage void unless they are in writing, and I must say in this case, as I have said on similar occasions before, that the decisions are to be regretted which have uniformly held that marriage is not part performance, so as to take parol contracts out of the statute." Malins, V. C., in Ungley v. Ungley, L. R. 4 Ch. Div. 73, 76 (1876).

"If this had been the case of a marriage contract I should have followed the decision of the highest tribunal in the land in Caton v. Caton [Law Rep. 2 H. L. 127]; that marriage is not a part performance of a parol agreement which will take a case out of the Statute of Frauds. It is difficult to say why this should be the case, but it has long been the rule in this Court." Malins, V. C., in Coles v. Pilkington, L. R. 19 Eq. Cas. 174, 179 (1874). See also (1896) 10 Harv. L. Rev. 60.

\textsuperscript{29} BROWNE, STATUTE OF FRAUDS (3d ed. 1870) § 459.

\textsuperscript{30} Ibid. citing Dundas v. Dutens, 1 Ves. 196, 199 (Eng. 1790).

\textsuperscript{31} Lacon v. Mertins, 3 Atk. 1, 4 (Eng. 1743); cf. Owen v. Davies, 1 Ves. Sen. 82 (Eng. 1747); Dickinson v. Adams, cited 4 Ves. 720, 722 (Eng. 1799).
payment of a part of the purchase money was "clearly of no con-
sequence, in case of an agreement touching lands or houses, the
payment of money being only binding in cases of contracts for
goods." 32

It is probable that the statement of Lord Loughborough, in
1799, 33 that the payment of a substantial part of the purchase
price was sufficient to take the case out of the statute, while the
payment of a small part was not, more nearly represents the rule
of the time. Certain it is that the rule in England was not defi-
nitely established until more than a century after the passing
of the statute. 34 But when the rule did crystallize, it was unequivocal
that payment of the purchase price, substantially or in small part,
was not sufficient to take the case of the statute. 35 The resulting
rule is well illustrated by the language of Cotton, L. J., in Britain
v. Rossiter: 36

"... it is well established and cannot be denied that
the receipt of any sum, however large, by one party under
the contract, will not entitle the other to enforce a contract
which comes within the 4th section."

American courts have reached a like conclusion. 37

Let us now consider the reasons that have moved equity to
arrive at this conclusion. Perhaps one of the most persuasive
reasons for holding that the payment of a part or all of the pur-
chase price was not sufficient to take the case out of the statute,

33 Main v. Melbourn, 4 Ves. 720, 724 (Eng. 1799): "It is not disputed, that
if part of the purchase-money substantially is paid, that takes it out of the stat-
ute. But it is contended, that five guineas are not enough upon the notion of
binding the bargain. I take it for granted, that five guineas were paid at the
time; whether upon the notion of binding the bargain or on account of the
purchase-money; they are certainly part of the 100 guineas: but so small a part,
that it does not indicate any intention to bind the bargain."
34 See 36 Cyc. 652 (1910): "The rule as to payment was not fully established
in England until more than a century after the enactment of the statute of
frauds."
35 Maddison v. Alderson L. R. 8 A. C. 467, 478 (1883); Humphreys v.
Green, L. R. 10 Q. B. D. 148 (1882).
36 L. R. 11 Q. B. D. 123, 131 (1879).
37 Franklin v. Matoa Gold Min. Co., 158 Fed. 941 (1907); Cooper v. Colson,
66 N. J. Eq. 328, 58 Atl. 337 (1904); Halsell v. Renfrow, 14 Okla. 674, 78 Pac.
118 (1904).
was seized upon by the chancellors almost immediately after the passage of the statute. The statute provided elsewhere that in the case of sales of goods, wares and merchandises, for the price of ten pounds or upwards it was necessary for the contract to be in writing except in certain cases, one of which was where the buyer gave "something in earnest to bind the bargain or in part of payment." The chancellors reasoned that, since the statute specifically took cases of contracts for goods out of the statute by the payment of money, it was the intention of the framers of the statute not to take cases of contracts for land out of the statute, under a like condition, since no provision had been made therefor. In other words, they reasoned that there had been a conscious omission of such an exception in the case of land contracts.

There is a second reason for this attitude, which, however, is not so apparent. Although Lord Hardwicke considered that a payment of money was an "act done, as appears to the court would not have been done, unless on account of the agreement," later authorities have concluded that a payment of a part or all of the

38 "And be it further enacted by the authority aforesaid, That from and after the said four and twentieth day of June [A. D. 1677] no contract for the sale of any goods, wares, and merchandises, for the price of ten pounds sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized." 29 Charles II, c. 3, § 17 (1677). (Italics are the author's.)

39 "But I think this is not a case in which part performance appears; the only circumstance that can be considered as amounting to part performance is the payment of the sum of fifty guineas to Mr. Cooke. Now, it has always been considered that the payment of money is not deemed part performance to take a case out of the statute. Seagood v. Meale, Prec. Chan. 560, is the leading case on that subject; there a guinea was paid by way of earnest; and it was agreed clearly that that was of no consequence, in case of an agreement touching lands; now, if payment of fifty guineas would take a case out of the statute, payment of one guinea would do so equally; for it was paid in both cases as part payment, and no distinction can be drawn; but the great reason, as I think, why part payment does not take such agreement out of the statute is, that the statute has said that in another case, viz., with respect to goods, it shall operate as part performance. And the courts have therefore considered this as excluding agreements for lands, because it is to be inferred, that when the legislature said it should bind in the case of goods, and were silent as to the case of lands, they meant that it should not bind in the case of lands." Clinan v. Cooke, 1 Schoales & Lefroy, 22, 40 (Eng. 1802).

purchase money is not an act related unequivocally to a contract concerning land. This attitude, which the courts have followed, is expressed in the well reasoned case of Maddison v. Alderson, where Lord Selborne said:

"... part payment of purchase-money is not enough; and judges of high authority have said the same even of payment in full ... Some of the reasons which have been given for that conclusion are not satisfactory; the best explanation of it seems to be that the payment of money is an equivocal act, not (in itself), until the connection is established by parol testimony, indicative of a contract concerning land. I am not aware of any case in which the whole purchase-money has been paid without delivery of possession, nor is such a case at all likely to happen. All the authorities show that the acts relied upon as part performance must be unequivocally, and in their own nature, referable to some such agreement as that alleged ..."

The writer finds it difficult to argue logically that payment of a part or all of the purchase price is not almost as clearly referable to the contract as would be a taking of possession. Where possession has been taken, equity has enforced the contract in many cases. It has been suggested that payment of the purchase price does not unequivocally indicate a contract concerning land, while possession does, but possession alone does not indicate the type of contract under which it was taken, nor whether it was taken with reference to this particular alleged contract. "At the most it merely suggests a part performance of some agreement relating to the land." Possibly the possession was under a mere parol license without any contract. In both the purchase money case and the case where possession is given, oral proof of the terms of the contract must be received. But the courts have

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41 Supra note 6, at 479.
42 Pomeroy, Specific Performance of Contracts (3d ed. 1926) § 113, note (a).
43 Note (1904) 4 Col. L. Rev. 294, 295.
44 Clark, Equity (1919) 179: "There are two difficulties with this theory; one is that taking possession does not necessarily show some contract with reference to the land; it might be that the entry was under a mere parol license of the vendor, without any contract. The other objection is that even assuming that it does necessarily show the existence of some contract, it does not ade-
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consistently, except immediately after the statute was passed, differentiated between the two situations.

If the purpose of equity courts is kept in mind and real practicability is considered, the third reason for refusing to permit a payment of the purchase price to be such part performance as to take a case out of the statute is the most important one. This reason is that the remedy at law is full and adequate. Let the purchaser sue in a law court to recover what he has paid. Of course, the objection to this is that the purchaser does not want his money back. On the contrary, he wants the benefit of his bargain, and he is entitled to it if the statute can be satisfied, since the parties are dealing with an unique subject matter. Here equity courts have considered that it is possible to place the parties once more in statu quo and have refused specific performance because of the failure to satisfy the statute, arguing that in doing so no fraud is worked on the plaintiff. The decisions relating to possession are not so consistent, many of them permitting a taking of possession to take the case out of the statute, when the statute was not satisfied and the parties could have, for all practical purposes, been placed in statu quo. It is submitted that the result in the purchase money cases is the better, for, in fact, the remedy at law is so far adequate that a fraud has not been worked on the purchaser. Rather than add a new section to the statute by judicial legislation, it is better to refuse to grant specific performance.

An interesting question arises in the purchase-money cases when the vendor is insolvent. The courts refuse to grant specific performance where a part of the purchase money has been paid, if the statute has not been satisfied, although the vendor is insolvent and consequently would be unable to repay what has been paid by the vendee. As a reason for this holding, the courts

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generally say that the fact of the vendor's insolvency is not a sufficient ground for imputing to the defendant the wrongful intent necessary to constitute fraud.\(^4\) Let us examine this reason, which is well illustrated by the leading case of Townsend v. Fenton.\(^5\) There the court said:

\[\text{"\ldots the courts have held that the inability of the vendor to repay the money by reason of his insolvency does not in that respect alter the relation of the parties, so as to modify the rule, because, there being nothing intrinsically fraudulent in the transaction, this circumstance is not a sufficient ground for imputing to the vendor the wrongful intent which alone furnishes an occasion for the interference of equity to enforce verbal agreements."} \(^6\)

It is submitted that this statement is too narrow. Relief is often granted where there is not such wrongful intent as to indicate actual fraud in the vendor, but merely an equitable estoppel, which requires no intent. In such cases equity will often give specific performance if to refuse to do so would operate as an *equitable fraud*. If the vendor is insolvent and the vendee has paid a part of the purchase money, in the case of a parol contract, is the vendee in such a position for all practical purposes, that to refuse relief will result in a case of equitable fraud?

The answer to this question is that, no matter how great the resulting hardship to the vendee, he has to meet the fact that the statute has not been satisfied. Here a payment of a part of the purchase money is all that is relied upon to take the case out of the statute. That is not enough, despite the fact that the vendor is insolvent. Consequently we do not have a case of equitable fraud, which requires acts unequivocally referable to the contract, so as to permit the doctrine of part performance to operate, and also such hardship as would work an equitable fraud on the vendee, if relief were refused. If the vendor is insolvent, the prior requisite cannot be fulfilled, where the payment of a part of the

\(^5\) 32 Minn. 482, 21 N. W. 726 (1884).
purchase price is the only act, referable to the contract, which may be relied upon, without the introduction of parol testimony.  

4. CASES INVOLVING POSSESSION

It is generally said that the cases dealing with part performance and the Statute of Frauds fall into two groups—fraud and possession. The doctrine was not evolved consistently, and the basis of many decisions is obscure, but this grouping seems the most satisfactory. The writer would desire, if he could do so, as previously suggested, to line up all the cases under the general head of fraud, but, as suggested by Dean Pound and others, this attempt is apparently futile. The fraud cases and the possession cases apparently had independent origins, and, while courts have not and do not always distinguish between them, they had an independent development. As the writer will attempt to point out, there is a tendency in the American cases to combine the two under the head of virtual or equitable fraud, but that is impossible in the early cases.

Just as no single theory will explain the inconsistencies of the doctrine of part performance, so no two theories will do so. It is difficult to see what principle of equity underlies many of

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50 Cf. Horack, Insolvency and Specific Performance (1918) 31 Harv. L. Rev. 702, 719, note 45: "In cases involving the Statute of Frauds the refusal of equity to grant specific performance has no bearing on the question of insolvency as a basis of jurisdiction, for, whether the legal remedy is inadequate because of the character of the property or the financial condition of the defendant, the proposition before the court is the observance and enforcement of the provisions of the statute rather than any question of the adequacy or inadequacy of the legal remedy."

51 "What is the actual situation? We say that for the purposes of courts of equity, cases are taken out of the purview of the statute in either of two ways: by fraud or by part performance. Recently there has been a tendency to run the two together, largely under the influence of Pomeroy's doctrine of 'equitable fraud.' But they had an independent origin and have developed along independent lines. Hence they call for independent consideration." Pound, op. cit. supra note 25, at 937.

52 Ibid. See also note (1918) 17 Mich. L. Rev. 172: "The doctrine was not evolved consistently and the basis of some applications of it is obscure. One who follows Sir Edward Fry's admirable but futile attempt (Fry, Specific Performance (5th ed.) §§ 580, ff.) to systematize the variant decisions of the English courts must feel doubtful whether any single theory will explain all the intricacies of part performance. Mr. Pomeroy sought to support the doctrine upon the all-embracing principle of fraud (Pomeroy, Contracts (2d ed.) §§ 103, 104), but unless it be fraud to fail to carry out a promise deliberately made when another has acted upon it, this explanation fails."
the decisions, and efforts to explain them rationally have been singularly unhappy. Many explanations found in subsequent decisions and in text-books or articles are no more than what Dean Pound calls ex post facto rationalizations of what has gone on in equity for historical or other reasons. But such classification, while not inclusive, is the one usually given, and it is sufficient for all practical purposes.

The fraud group of cases on part performance and the Statute of Frauds is not surprising in a court of equity, but it is difficult to explain the possession cases. Courts of equity have had the same difficulty. Often they have not attempted to find a reason, but have frankly followed precedent blindly. At other times they have not been so docile. The remarks of Lord Blackburn are illustrative of the attitude of such recalcitrant chancellors:

"... a delivery of possession of the land will take the case out of the statute. This is I think in effect to construe the 4th section of the Statute of Frauds as if it contained these words, 'or unless possession of the land shall be given and accepted.' Notwithstanding the very high authority of those who have decided those cases, I should not hesitate if it was res integra in refusing to interpolate such words, or put such a construction on the statute. But it is not res integra and I think that the cases are so numerous that this anomaly, if as I think it is an anomaly, must be taken as to some extent at least established. If it was originally an error it is now I think communis error and so makes the law."

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53 "That the purchaser has been let into possession, in pursuance of a parol agreement, has been very generally recognized as sufficient to take it out of the statute. The reasoning by which this result was reached is far from satisfactory; and even where the rule prevails, there are frequent intimations that it is regarded as trenching too closely upon the spirit as well as the letter of the statute. If it were now open to settle the rule anew, we cannot doubt that it would be limited to possession accompanied with or followed by such change of position of the purchaser as would subject him to loss for which he could not otherwise have adequate compensation or other redress; and that mere change of possession would not be held to take a case out of the statute. However it may be elsewhere, we are disposed to hold the rule to be so in Massachusetts." Glass v. Hulbert, 102 Mass. 24, 32 (1869). See also note (1918) 17 Mich. L. Rev. 172, 173.

54 Maddison v. Alderson, L. R. 8 A. C. 467, 489 (1883).
But Lord Blackburn, like so many recalcitrant chancellors who considered that the rule had nothing more to support it than history and precedent, followed the rule. His English successors have done likewise. But the majority of American courts have refused to follow so arbitrary a rule, which they consider to be based largely on precedent and to be without good cause.

What reasons influenced the courts in the possession cases? It appears that at least four may be found.

(a) The influence of livery of seisin

The leading case of the possession group is Butcher v. Stapely,58 in which there was a parol agreement of sale and a delivery of possession to the vendee. Specific performance was given against a subsequent purchaser with notice. No reason for the decision was given by the court, the Lord Chancellor merely saying that "in as much as possession was delivered according to the agreement, he took the bargain to be executed." Does the decision imply that a contract executed on one side was not within the purview of the statute? Manifestly not. Since the Chancellor said that inasmuch as possession was given the bargain was executed, many subsequent commentators have suggested that the basis of the decision was the idea of livery of seisin.

This attitude is illustrated in an article by Dean Pound:58

"Sugden long ago called attention to some old cases which indicate that this was the result of ideas as to livery of seisin. Putting the purchaser in possession was taken to be the substance of a common-law conveyance. The rule thus derived became established in England and in a majority of American jurisdictions."

Prior to the statute, livery of seisin had long been the mode of transferring title to land. At first it had been an open and notorious act, performed in the presence of the neighbors, accom-
panied by a symbolical delivery of turf or a twig, a declaration of the extent of the estate granted, and a deed or charter of feoffment. But, as time went on, relaxations crept in until the notoriousness of the act no longer existed. The loose and informal mode of transferring land, which livery of seisin had then become, was a great incentive to the unscrupulous to attempt to prove transfers by false and fraudulent means. Perjury and subornation of perjury became common. To remedy the situation the statute was passed. Sections one and two of the statute expressly abolished the evidential value of livery of seisin:

"... all leases, estates, interests of freehold, or terms of years, or any uncertain interest of, in, to or out of any messuages, manors, lands, tenements or hereditaments made or created by livery of seisin only, or by parol, and not put in writing, and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the effect of leases or estates at will only, and shall not either in law or equity be deemed or taken to have any other or greater force or effect; ... except nevertheless all leases not exceeding the term of three years from the making thereof."

Thus the effect of the statute was to make all estates created by livery of seisin or by parol, with certain exceptions, possess no greater force nor effect than estates at will, unless evidenced by a writing.

If the statute abolished livery of seisin as a mode of conveyance, how can the decision in Butcher v. Stapely be supported? Perhaps the attitude of the courts at that time towards statutes in general had something to do with the decision. As Dean Pound suggests:

"... the air was full of ideas of natural law, on a higher plane than any human legislation, and the courts of law were about to decide that the king, in particular cases and 'on necessary and urgent occasions,' could in his discretion dispense with penal statutes. If for good reasons James II might dispense with a statute of Charles II requiring pub-

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60 29 Charles II, c. 3, §§ 1, 2 (1677). (Italics are the author's.)
lic officers to take a test oath, Lord Jeffreys [in Butcher v. Stapely] might well feel that James' chancellor, for good reasons, could dispense with another statute of Charles II, requiring contracts for the sale of land to be in writing."

This is the most satisfying explanation of Butcher v. Stapely, in view of sections one and two of the statute. This explanation makes it of little value as a precedent.

The explanation of Butcher v. Stapely and the relation of the idea of livery of seisin to the possession cases is handled differently in Miller v. Lorentz:

"Actual possession was still *prima facie* evidence of ownership in fee, and it was not the purpose of the statute to weaken or disparage it, or to dispense with the delivery of possession in many cases, but to provide a certain and stable memorial of the transaction; in other words, making the deed of feoffment, or some writing signed by the parties, essential to the creation of the estates mentioned . . . It only needed some certain and stable memorial to make it in every sense complete. Such as would have existed had there been a formal delivery of seisin and deed of feoffment. Such cases were soon after the statute hardly considered within its meaning, and did not need to be taken out of it, but were put on the ground of estoppel against the perpetration of a fraud."

In other words, it was considered, that, in cases where possession was taken, there was sufficient evidence of the contract to have satisfied the framers of the statute and that consequently possession cases were not within the intention of the legislature. It was argued that, if the ancient mode of livery of seisin had continued, there would have been no statute. So if there was a situation which would have substantially satisfied the requirements of ancient livery of seisin, it was not intended to be within the purview of the statute, or at least not within the situations which the statute was intended to remedy by demanding a writing. In such a case it would be a fraud on the plaintiff to permit the de-

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61 *Supra* note 46, at 167, 19 S. E., at 393.
fendant to plead the statute. As Dean Pound suggests, this may be an *ex post facto* rationalization of what went on in equity for historical reasons, but at least it is persuasive.

But we are interested, from a practical standpoint, as to whether *Butcher v. Stapely* and similar cases, holding that possession alone was sufficient to take the case out of the statute, because of an idea that substantial livery of seisin should do so, should have furnished precedents to be followed by courts of equity over the succeeding years. Manifestly they should not and do not. The historical reason suggested by Dean Pound was bound to be but temporary in its influence, and the ground of equitable estoppel suggested in *Miller v. Lorentz* is not satisfying in view of sections one and two of the statute.

Perhaps the influence of livery of seisin for a comparatively short period may be justified by the argument suggested in *Purcell v. Coleman*, which is, that since it had long been the custom to transfer land by livery of seisin, it would have worked a great injustice with an ignorant people to attempt suddenly to break down such an old custom, even by an act of Parliament. Consequently, in order to evade such an injustice, it was presumed that the legislature did not intend any innovation on the common law further than the case absolutely required, and this equitable interpretation of the statute eased the severity of the operation of the new enactment. But this exception, even if we assume that it should have been made, should have been but a temporary expedient, which should have ceased to be an exception when the new law became a part of the customs of the country. In view of the language in sections one and two of the statute, where the attitude of the legislature toward livery of seisin is plainly manifested, such an equitable indulgence should not have continued longer than absolutely necessary.

If the idea of livery of seisin, no matter what its origin, still has any influence on the doctrine of part performance, it has abso-

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16 D. C. 59 (1864).
17 "But exceptions founded on this principle must naturally be but temporary expedients, which must die away when the new law itself has become part of the general customs of the country." Poorman v. Kilgore, *supra* note 7, at 370.
lutely no justification, in the opinion of the writer. Any reasons which may be suggested to support it must be purely historical and have no value except as hoary precedents.

(b) The argument that otherwise the vendee or lessee would be liable as a trespasser

The idea that one who had gone upon land under an oral contract might be driven off as a trespasser, or liable as such, if the statute were enforced against him, is one of the main reasons given for considering mere possession as a sufficient ground for taking the case out of the operation of the statute. It was considered that he could give evidence of the oral contract to shield himself from the pains and penalties which might follow the trespass, and, if admissible for this purpose, it should be admissible throughout.94

There appear to be at least two good arguments to rebut the contention that the vendee would be liable as a trespasser, unless the statute is frustrated.

In the first place, there is no need for a decree of specific performance in order to help the party in possession out of his predicament, since he would be protected as a licensee. Delivery of possession may well be considered as a license to enter and enjoy the rents and profits. Such license would surely protect the one in possession from an action for trespass or rents, when the vendor or lessor refuses to carry out the contract because of the

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94 "... the party was let into possession on a parol agreement, and it was said that he ought not to be liable as a wrong doer, and to account for the rents and profits, and why? because he entered in pursuance of an agreement. Then for the purpose of defending himself against a charge which might otherwise be made against him, such evidence was admissible, and if it was admissible for such purpose, there is no reason why it should not be admissible throughout. That, I apprehend, is the ground on which courts of equity have proceeded, in permitting part performance of an agreement to be a ground for avoiding the statute." Clinan v. Cooke, supra note 39, at 41.

"Now for the purpose of defending himself against a charge as a trespasser, and a suit to account for the profits in such a case, the evidence of a parol agreement would be admissible for his protection; and if admissible for such a purpose, there seems to be no reason why it should not be admissible throughout." Story, Equity Jurisprudence (13th ed. 1886) § 761; Tilton v. Tilton, 9 N. H. 385 (1838); Arguello v. Edinger, 10 Cal. 150, 159 (1859); Pomeroy, Specific Performance of Contracts (3d ed. 1926) §§ 104, 115. But see Glass v. Hulbert, 102 Mass. 24, 33 (1869); Ann Berta Lodge v. Leverton, 42 Tex. 1832 (1875).
statute. The statute does not prohibit the hearing of proof of an oral contract for the purpose of charging the other party on the contract. This conclusion is illustrated by the opinion of Wells, J., in Glass v. Hurlbert:

"Mere possession of land does not expose the party to loss or danger of loss without redress at law. The parol agreement of sale and purchase, with permission to enter, though not to be enforced as a valid contract of sale, will constitute such a license as will protect the party from liability for acts done before the license is revoked, and for all acts necessary to enable him to remove himself and his property from the premises after such revocation. If possession be taken without such permission, express or implied, it is no foundation for relief in equity, according to any of the authorities. The argument, for the admission of parol evidence to prove an agreement within the statute of frauds in order to enforce it in equity, drawn from the admissibility of such evidence to maintain a defense, either at law or in equity, seems to be based upon a misconception of the purport and force of the statute, which reaches no farther than to deny the right of action to enforce such agreements."

Secondly, there is no need for a decree of specific performance in order to protect the one in possession under the parol contract, since the statute itself affords him sufficient protection, giving him an estate at will. Section one of the statute provides:

"All leases, estates, interests of freeholds or terms of years, or any uncertain interest of, in, or out of any messuages, manors, lands, tenements or hereditaments, made or created by livery and seisin only, or by parol, and not put in writing and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and shall not, either in law or equity, be deemed or taken to have any other or greater force or effect."

The statute, in this section, apparently gives the purchaser or lessee of land, in possession under an oral contract, an estate

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65 Supra note 64, at 33; cf. Ann Berta Lodge v. Leverton, supra note 64; (1920) 29 YALE L. J. 462; note (1904) 4 COL. L. REV. 294.
66 29 Charles II, c. 3, § 1 (1677). (Italics are the author's.)
at will, which should be sufficient to protect him from a suit for trespass. This view is suggested by Kennedy, J., in *Allen's Estate*: 67

"But seeing the English Act, as well as our own, gave to the party put into possession under the parol contract for the purchase of the land in fee, an implied at least, if not an express estate at will, which was sufficient to prevent his being made a trespasser until the vendor entered upon him and gave him notice to quit, it is difficult to imagine why it should have been deemed necessary to carry the contract into complete execution in order to protect the vendee from being punished as a trespasser for having entered and occupied the land before he had notice to quit."

We conclude, therefore, that the argument that it is necessary to decree specific performance in order to protect the one in possession from being a trespasser is without good foundation.

(c) The belief that the rule of the Statute of Frauds is an evidential rule, and that any acts clearly and solely referable to the existence of the contract satisfy the purpose of the statute in equity

It is apparent that the English rule, that possession alone is sufficient to take a case out of the statute, rests partly upon the theory that the statute is evidential in character, rather than substantive. This attitude has strongly influenced the cases on part performance. American courts of equity, regardless of their attitude towards the statute, whether they considered it substantive or evidential, have in some cases followed the English rule without inquiring as to the reasons for it; or, if they did inquire, and sought to rationalize the result, it was usually put upon the ground of the influence of livery of seisin, or that otherwise the one in possession would be a trespasser.

Considering that the statute was evidential, the early English chancellors, or at least some of them, apparently thought that it should not apply in equity when, from the nature of the proof,

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there could be no danger of perjury. They considered, said Lord Blackburn, that "whenever acts had been done which were such as to be consistent only with the existence of a contract, the case was taken out of the mischief of the statute and the only question was the sufficiency of the proof of what the contract was." Possession of land was an act so unequivocal in its nature that it satisfied this requirement, and parol proof could be introduced, it was concluded, to show the terms.

It is submitted that this line of reasoning cannot be supported. The statute itself provided that the contract was unenforceable unless signed by the party to be charged or his agent, and it made no provision for the substitution of any other kind of evidence. The only evidence provided for by the statute was a writing. However, this wrongful interpretation of the early chancellors became precedent, and, as precedent, it was followed by their successors in England and, in some instances, in America.69

(d) The influence of the equitable fraud idea. Herein of the modern tendency to eliminate the historical difference between the "possession" and "equitable fraud" cases and to make equitable fraud the sole test

In a few states the doctrine of part performance has been very narrowly confined to cases where damages at law would be inadequate and the plaintiff would accordingly suffer irreparable injury if specific performance were not given. Such a limitation it is submitted, presents the proper solution to the problem. In these cases, possession is important, since it represents an act which is so unequivocal in its nature that it has high evidential value to prevent fraudulent claims, but it should not be necessary, having no sacred power of its own.70 Whatever may have

68 L. R. 8 A. C. 467, 488 (1883); see also Morris v. Barron and Company, L. R. (1918) A. C. 1, 15; cf. COMMENTARIES ON CONTRACTS RESTATEMENT (Am. L. Inst. 1928) § 194.
69 WILLISTON, CONTRACTS (2d ed. 1924) § 494.
70 "It is probable that improvements alone of a valuable, substantial and permanent character, placed upon the land with the consent of the vendor, would
been the efficacy of possession in history, because of the influence of livery of seisin, or the argument that otherwise the vendee or lessee would be liable as a trespasser, or the belief that the rule of the Statute of Frauds is an evidential rule and that an act (possession) furnishing sufficient evidence of a contract satisfied the purpose of the statute, or for any other reason, it should lose its efficacy now except as evidence. In other words, the proper test is not part performance at all, but equitable fraud, the court merely requiring sufficient acts to prove the contract satisfactorily, in order that fraudulent claims may not be set up. This line of reasoning would remove the possession group of cases from consideration in determining a modern case. They would become only interesting precedents, no longer to be followed, but important to know about because of their historical significance and their influence upon the law.

An early example of a combination of possession and fraud is found in a case reported by Viner:\footnote{5 Vin. Ab. (2d ed. 1792) 523.}

"Next in Lord Jeffrey's time, where putting the party into possession was such an execution of the agreement in part as was good against a subsequent purchaser, for where one stands by, and sees the party lay out his money in building on the defendant's ground, he was bound thereby. The bill here was to have a lease according to the defendant's promise, plaintiff having laid out money in the premises, and the defendant insists on the statute, there being no agreement in writing, nor any certain terms agreed upon, and says what plaintiff laid out was not on lasting improvements, but admits that plaintiff built a stable which cost him about ten pounds. It was proved, that defendant told the plaintiff his word was as good as his bond, and promised the plaintiff a lease when he should have renewed his own from his landlord. Lord generally be held sufficient part-performance though there was neither a taking of possession nor payment of the price. Calanchini v. Branstetter, 84 Cal. 249, 24 Pac. 149 (dictum); Dickenson v. Barron [1904] 2 Ch. 339 (suit by vendor). Improvements and payment taken together have been held sufficient part performance. Fulton v. Jansen, 99 Cal. 589, 34 Pac. 331; Cooley v. Lobdell, 153 N. Y. 596, 47 N. E. 783 (semblé); Lloyd v. Hollenback, 98 Mich. 203, 57 N. W. 110; Brown v. Western Md. Ry. Co., 84 W. Va. 271, 99 S. E. 457."

Chancellor said, that the defendant is guilty of a fraud, and ought to be punished for it, and so decreed a lease to the plaintiff . . . ”.

Here we have language which has been repeated in practically the same words in many subsequent cases: “where one stands by and sees the party lay out his money in building on the defendant’s ground, he is bound thereby.” The basis of this language is equitable estoppel. That, in some degree, together with the impossibility of an adequate remedy at law, furnish the ground for the equitable fraud cases.

Morphet v. Jones is another early case furnishing a good illustration of a combination of possession and equitable fraud. In that case there was a parol agreement to grant a lease, accompanied by a delivery of possession. The court said:

“In order to amount to part-performance, an act must be unequivocally referable to the agreement; and the ground on which courts of equity have allowed such acts to exclude the application of the statute, is fraud. A party who has permitted another to perform acts on the faith of an agreement, shall not insist that the agreement is bad, and that he is entitled to treat those acts as if it had never existed. That is the principle . . . ”

Mere possession of land does not satisfy the requirements of the Statute of Frauds. It does not, except in rare instances, expose the party to loss or danger of loss without redress at law. To hold, therefore, that possession alone is sufficient to take a case out of the statute, is to have, it seems to the writer, an utter misconception of the purport and force of the statute.

But there are cases, where the requirements of the statute are not satisfied, in which equity should give relief. Where the acts done have been induced by the contract and are done in reliance upon its performance, and are such that adequate compensation cannot be made except by the conveyance of the premises, it would be fraudulent in the promisor to withhold a con-

72 1 Swans. 172 (1818); cf. Mundy v. Jolliffe, 5 Myl. & C. 167, 177 (1839).
73 Ibid. at 181.
veyance, if he knew, or should reasonably have known, of such acts, and he should be estopped from setting up the statute. These are the real equitable fraud cases.\footnote{Glass v. Hulbert, 102 Mass. 24 (1869); Potter v. Jacobs, 111 Mass. 32 (1872); Burns v. Daggett, 141 Mass. 368, 6 N. E. 727 (1886); Low v. Low, 173 Mass. 580, 54 N. E. 257 (1899); Perkins v. Perkins, 181 Mass. 401, 63 N. E. 926 (1902); Williams v. Carty, 203 Mass. 396, 91 N. E. 392 (1910); Sample v. Horlacher, 177 Pa. 247, 35 Atl. 615 (1896).}

An eminent writer has said: “In Massachusetts the doctrine of part performance is limited perhaps as strictly as in any jurisdiction where the doctrine is recognized at all.”\footnote{Williston, Contracts (2d ed. 1924) § 494.} There every case must meet the searching inquiry: If specific performance is refused in this case, will the plaintiff be placed in a position where he will suffer irreparable injury? If he can be made whole without it, specific performance will be refused. This seems to be the proper result. Only a few states approach the problem as thoughtfully as does Massachusetts, but the tendency seems to be in that direction.

In removing the possession cases as precedents, we would not underestimate the value of possession as evidence of a contract. Possession of land is almost unequivocal evidence, prima facie at least, of some kind of contract relating to that land. So it will remain important as an evidential fact, and most states require it. Certainly, in any case, not only must the plaintiff make out a case of equitable fraud, in order to get specific performance, but he must also give satisfactory proof of the contract. As to the latter, the courts are very severe and should continue to be so. The attitude of the Pennsylvania courts is exemplified by the case of Hart v. Carroll,\footnote{85 Pa. St. 508, 510 (1877).} where the court said:

"In order to take a parol contract for the sale of lands out of the operation of the Statute of Frauds, its terms must be shown by full, complete, satisfactory and indubitable proof. The evidence must define the boundaries and indicate the quantity of land. It must fix the amount of the consideration. It must establish the fact that possession was taken in pursuance of the contract, and at or immediately
after the time it was made; the fact that the change of possession was notorious, and the fact that it has been exclusive, continuous and maintained."

This tendency on the part of equity to insist upon unequivocal proof of the contract is emphasized by Judge Cardozo in the fairly recent case of *Burns v. McCormick*: 

"Inadequacy of legal remedies, without more, does not dispense with the requirement that acts, and not words, shall supply the framework of the promise. That requirement has its origin in something more than an arbitrary preference of one form over others. It is 'intended to prevent a recurrence of the mischief' which the statute would suppress. Maddison v. Alderson, L. R. 8 App. Cas. at page 478. The peril of perjury and error is latent in the spoken promise. Such, at least, is the warning of the statute, the estimate of policy that finds expression in its mandate. Equity, in assuming what is in substance a dispensing power, does not treat the statute as irrelevant, nor ignore the warning altogether. It declines to act on words, though the legal remedy is imperfect, unless the words are confirmed and illuminated by deeds. A power of dispensation, departing from the letter in supposed adherence to the spirit, involves an assumption of jurisdiction easily abused, and justified only within the limits imposed by history and precedent. The power is not exercised unless the policy of the law is saved."

It is submitted that this is the correct attitude. If the courts will insist upon that type of evidence, and make equitable fraud the test rather than some kind of part performance, the policy, at least, of the statute will be saved, and the result will be good equity.

**Conclusion**

We conclude that, although historically the cases on part performance fall into two groups, fraud and possession, the reasons behind the possession group are purely historical, and that consequently those cases should have no influence as precedents upon modern cases.

\[233\text{ N. Y. 230, 235, 135 N. E. 273, 274 (1922).}\]
The phrase "part performance" is a misnomer. Cases should not be taken out of the statute because of certain types of acts of part performance, but solely to prevent fraud. In other words, the golden thread running through the cases on part performance and the Statute of Frauds is the prevention of fraud. American courts are showing a marked tendency to rest the doctrine upon equitable fraud, insisting, however, that the acts in question be referable to a contract, in order to prevent the very evil which the statute was passed to prevent. There should not be a case of equitable fraud unless the plaintiff will be placed in a position where he will suffer irreparable injury if specific performance is refused. This result is in accord with general equitable principles and does not thwart the policy of the statute.